

HON. RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT COURT OF WASHINGTON  
AT SEATTLE

STATE OF WASHINGTON;

Plaintiff,

v.

LANDMARK TECHNOLOGY A, LLC, and  
RAYMOND MERCADO, individually,

Defendants.

NO. 2:21-cv-00728-RSM

[PROPOSED] ORDER STRIKING  
STATE'S WITNESSES ALEX STRAND  
AND DAVID DAY

THIS MATTER, having come before the Court on Defendants' Motion to Strike State's Experts or, in the Alternative, to Grant Extension on Rebuttal Witness Reports, and the Court having reviewed the prior pleadings and filings herein, as well as:

1. Defendants' Motion to Strike State's Experts or, in the Alternative, to Grant Extension on Rebuttal Witness Reports;
2. Declaration of Justin P. Walsh in Support of Defendants' Motion to Strike State's Experts or, in the Alternative, to Grant Extension on Rebuttal Witness Reports;
3. The State's Response, and supporting declarations thereto;
4. Defendants' Reply, and supporting declarations thereto,

the Court considers itself fully advised on the matter before it.

[PROPOSED] ORDER STRIKING STATE'S WITNESSES ALEX  
STRAND AND DAVID DAY - 1

**Gleam Law, PLLC**

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On April 24, 2023, this Court set a deadline for disclosure of expert reports of April 17, 2024. The parties did submit a stipulation amending this schedule. However, the Court did not enter an order granting this stipulation, and the dates in the Amended Case Scheduling order remained. The State submitted two expert reports on May 31, 2024, which, though the date the parties attempted to stipulate to, was not the date set by this Court.

It is well settled that “A stipulation by the parties for an extension of time is ineffective if it is not also embodied in an order of the district court.” WRIGHT & MILLER, FED. PRAC. & PROC. § 1165: EXTENDING TIME IN GENERAL, & n.37 (4th Ed. & June 2024 Update) (citing *In re Sonoma V*, 703 F.2d 429 (9th Cir. 1983), and collecting cases).

A failure to timely submit the report by the date ordered by the Court results in a self-executing exclusion of the expert. As If a party fails to timely disclose its expert witnesses in a manner prescribed by the court, the party is not allowed to use that witness to supply evidence, unless the failure was substantially justified or is harmless. FED. R. CIV. P. 37(c)(1). Rule 37(c) (1) “gives teeth” to the disclosure requirements of Rule 26(a)(2)(A). *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Exclusion of improperly disclosed expert witnesses is “selfexecuting [*sic*] . . . and automatic to provide a strong inducement for disclosure of material . . .” *Id.* at 1106 (citations and internal quotation marks omitted). Thus, the burden falls on the party facing the sanction to demonstrate that its expert witness should not be excluded under Rule 37(c)(1). *Id.* at 1107; *see also Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir.2008).

*Nehara v. Cal.*, No. 1:10-cv-00491 JLT, 2013 WL 5670867 (E.D. Cal. Oct. 16, 2023). “A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril. The district court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of [the parties'] case. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir.1992) (internal citation and quotations omitted).

1 The State was well-aware of this Court's order, and the Court never ordered differently.  
2 As such, the reports of the State's experts are untimely. David Day and Alex Strand's reports are  
3 stricken and they shall not be permitted to testify at trial.  
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5 SO ORDERED this \_\_\_\_ day of July, 2024.  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the United States of America, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

ROBERT W. FERGUSON	<i>Attorneys for Plaintiff</i>	<input type="checkbox"/> Via Messenger
Attorney General		<input checked="" type="checkbox"/> Via Email
AARON J. FICKES, WSBA #51584		<input type="checkbox"/> Via Certified Mail
BEN J. BRYSAZ, WSBA #54683		<input type="checkbox"/> Via U.S. Mail
HEIDI C. ANDERSON, WSBA #37603		<input checked="" type="checkbox"/> Via ECF
Assistant Attorneys General		
Attorneys for Plaintiff State of Washington		
800 Fifth Avenue, Suite 2000		
Seattle, WA 98104		

DATED this 14th day of June, 2024, at Seattle, Washington.

s/Joseph A. Hylkema  
Joseph A. Hylkema  
Paralegal to Justin P. Walsh